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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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BS

FILE:

WAC 04 252 52024

Office: CALIFORNIA SERVICE CENTER

Date: OCT 12 2006

IN RE:

Petitioner:

Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a consulting firm. It seeks to employ the beneficiary permanently in the United States as a software consultant pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence, including payment records for the beneficiary and other individuals, amended tax returns, and a letter from a certified public accountant, claiming that the petitioner's original tax returns were inaccurate.

Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 204.5(g)(2) state, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 5, 2001. The proffered wage as stated on the Form ETA 750 is \$42.41 per hour, which amounts to \$88,212.80 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since November 2002. (The Form ETA 750 was originally filed on behalf of another alien; the present beneficiary was later substituted.)

On the I-140 petition form, the petitioner claimed to have been established on June 8, 1998, to have a gross annual income of \$2,898,107, and to currently employ 25 workers. The petitioner left blank the space marked "Net Annual Income." In support of the petition, the petitioner submits a Form W-2 Wage and Tax Statement, indicating that the petitioner paid the beneficiary \$54,868.00 in 2003. This amount falls short of the proffered wage by more than \$33,000. Another Form W-2 shows that the petitioner paid the beneficiary \$7,500.00 in 2002. This is equivalent to roughly one month's work (22 eight-hour weekdays) at the proffered rate of \$42.41 per hour. The beneficiary had indicated that he began working for the petitioner in November 2002 (presumably early in the month, because he left his former job in October 2002). Photocopied pay stubs

from mid-2004 show that the beneficiary's gross pay is \$2,500 twice a month, or \$60,000 per year. This is higher than the above amounts, but still falls well short of the proffered wage.

The petitioner also submits copies of its corporate tax returns for 2001 through 2003. The documents contain the following information:

| | 2001 | 2002 | 2003 |
|--------------------------------|-------------|-------------|-------------|
| Gross receipts | \$2,331,792 | \$1,912,613 | \$2,898,107 |
| Total income [gross profit] | 1,938,815 | 1,646,165 | 2,114,981 |
| Ordinary [net] income | 4,126 | 16,114 | 22,964 |
| Non-officer salaries and wages | 1,097,718 | 942,157 | 1,210,847 |
| Cash | (26,069) | (117,586) | (153,694) |
| Other current assets | 318,643 | 370,699 | 1,046,370 |
| Current liabilities | 238,308 | 178,721 | 791,071 |
| Net current assets | 54,266 | 74,392 | 101,605 |

The director denied the petition, stating that the above figures show that the petitioner may have been able to pay the beneficiary's full proffered wage in 2003, but not in earlier years. The director also observed that the petitioner had immigrant petitions on behalf of at least six other aliens, and that the petitioner must show its ability to pay *all* of their wages; the same funds cannot be counted multiple times.

On appeal, counsel asserts: "New evidence establishes that the petitioner is currently employing and paying the beneficiary the proffered wage, and that the petitioner's net current assets are greater than the proffered wage." Counsel cites a memorandum from William R. Yates, Associate Director of Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* (May 4, 2004). In this memo, Mr. Yates stated:

CIS adjudicators should make a positive ability to pay determination in any one of the following circumstances:

(1) Net income

The initial evidence reflects that the petitioner's net income is equal to or greater than the proffered wage.

(2) Net current assets

The initial evidence reflects that the petitioner's net current assets are equal to or greater than the proffered wage.

(3) Employment of the beneficiary

The record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage.

Counsel asserts that the petitioner has met conditions (2) and (3) described in the memorandum. The beneficiary's 2004 Form W-2 shows that the petitioner paid the beneficiary \$88,219.73 during that year, thus meeting the proffered wage for that year. 8 C.F.R. § 204.5(g)(2), however, clearly indicates that the petitioner must *consistently* be able to pay the proffered wage from the filing date until the beneficiary becomes a lawful permanent resident. The petitioner's ability to pay the proffered wage in 2004 cannot, by itself, overcome the petitioner's inability to pay the full proffered wage in earlier years.

On appeal, the petitioner submits amended tax returns prepared by an independent accountant, [REDACTED] who submits a letter in support of the appeal. The amended tax returns do not increase the petitioner's net income. Rather, the petitioner is still relying on net current assets to establish an ability to pay all the beneficiaries the full proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001, 2002 or 2003.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. We concur with the director that the petitioner's net income cannot establish its ability to pay the difference between the proffered wage and the beneficiary's actual wages in 2001, 2002 or 2003.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business.

Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

In his letter, submitted on appeal, [REDACTED] states that "there were errors in the preparation of the 2001-2003 tax returns." The petitioner submits copies of amended returns for those years, stamped as received by the Internal Revenue Service. On the amended returns, the petitioner has claimed the following amounts:

| | 2001 | 2002 | 2003 |
|----------------------|-----------|-----------|-------------|
| Other current assets | \$358,842 | \$331,766 | \$1,081,370 |
| Current liabilities | 66,131 | 57,478 | 462,055 |
| Net current assets | 292,711 | 274,308 | 619,315 |

On the amended returns, the petitioner has substantially decreased the petitioner's current liabilities and completely eliminated the "cash" line item (always a negative amount on the tax returns). In so doing, the petitioner has altered its total assets, liabilities, and shareholder equity. The new returns show many hundreds of thousands of dollars in "Mortgages, notes, bonds payable in 1 year or more," never claimed on the original returns. The accountant does not explain where this extra money came from except to make the vague and general statement that "[c]ertain items were treated incorrect [sic] from an accounting and tax perspective." The petitioner has, thus, presented two vastly different pictures of its current assets, with no documentation to show why the second version is more credible than the first. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 592 (BIA 1988).

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

states that the total salary due to the group of six beneficiaries was \$540,676 per year.² acknowledges that the total salaries actually received by the group fell short of this amount by over \$200,000 per year, but he contends that the (newly recalculated) net current assets were always sufficient to make up for the shortfall. The director, in the denial notice, had observed that “[l]iquidating the petitioner’s current assets to meet the proffered wage would have depleted the funds available,” and the petitioner provides no response to this observation on appeal. argument hinges on the premise that the current assets are cumulative (i.e., that they can be added together for a grand total of \$1,186,334 in current assets for the period from 2001 to 2003), but he fails to specify any flaw in the director’s previous assertion.

The petitioner admits that it substantially underpaid the beneficiaries of its recent immigrant visa petitions, even while claiming that it could have paid them the full proffered wage. (The petitioner does not explain why, if it supposedly *could* have paid the full wage, it did not do so.) The petitioner has not shown that the amended tax returns are more credible than the original returns. The petitioner has failed to submit credible evidence sufficient to demonstrate that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

² While the director only indicated that there were six beneficiaries of petitions filed by the petitioner, we note that the petitioner has filed more than six immigrant petitions between 2001 and 2003 with all four Service Centers. In addition, the petitioner has filed numerous nonimmigrant petitions over this time. While a nonimmigrant petition need not be supported with evidence of the petitioner’s ability to pay, the number of nonimmigrant petitions is relevant when considering an ability to pay the beneficiary of an immigrant petition.